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NO. 89-1210

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JANET HARDUVEL, et al.,
Petitioner,

v.

GENERAL DYNAMICS CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Does the *Boyle* government contractor defense create a new federal common law of product liability that displaces state tort law with regard to manufacturing defects?

2. Does the *Boyle* government contractor defense shift the burden of proof to the plaintiff to show that the equipment did *not* conform to specifications?

3. Did the lower court err in its failure to remand to the trial court for a factual determination under *Boyle*, in contravention of Rule 38(a), Rule 50(d), and the Seventh Amendment right to trial by jury?

4. Did the lower court err in its application of the standard of review on motions for judgment notwithstanding the verdict?

LIST OF PARTIES

Petitioner/Appellant/Cross-Appellee/Plaintiff

- Janet Harduvel, who was the wife of Captain Ted Harduvel at the time of his death on November 15, 1982.
- Christina Harduvel, minor child of Captain and Mrs. Harduvel.

Respondent/Appellee/Cross-Appellant/Defendant

- General Dynamics Corporation.

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PETITIONER'S REPLY BRIEF

Petitioner, Janet Harduvel, files this brief in reply to General Dynamics' brief in opposition, and again asks that her petition for a writ of certiorari be granted.

INTRODUCTION

Counsel for the Petitioner were served with General Dynamics' brief in opposition on March 5, 1990. The The petition is now under submission to the Court and is scheduled for conference on March 16, 1990. Janet Harduvel asks that this reply be considered with the documents under submission.

In its brief in opposition, General Dynamics has presented several new matters, all of which demand a reply. *See* Sup. Ct. R. 15.6. Janet Harduvel now replies.

ARGUMENT IN REPLY

1. Alleged Omissions from the Statement of the Case.

Although General Dynamics has reproduced Janet Harduvel's Statement of the Case almost in its entirety, General Dynamics maintains that Mrs. Harduvel omitted from her statement the fact that the standby attitude indicator (SAI) "provides the pilot with accurate gyroscopic navigational information for a minimum of nine minutes following cessation of all power, including a total electrical failure." General Dynamics' Brief at 3 n.2. If such was an omission, it was not a material omission.

The evidence revealed that the SAI "was found to have an incorrect reading at impact." *Harduvel v. General Dynamics Corp.*, Memorandum Decision (M.D. Fla. October 2, 1987) (reproduced in Petition as Appendix C, at C3). Indeed, as even General Dynamics' witnesses recognized, the SAI was found to have a reading of forty degrees nose up, when the aircraft crashed at an angle of about sixty-five degrees nose down (R. 11-79; 13-210; 14-106, 107).

Further, the evidence revealed that the inertial navigation unit (INU)—the F-16's primary attitude reference instrument—was not receiving power at impact. *Harduvel,* Mem. Dec. at C3. The condition of these crucial flight instruments supported Mrs. Harduvel's theory of a major electrical failure "which disabled the navigational instruments in the aircraft." *Id.* at C3.

2. Alleged Absence of Conflict in the Court of Appeals.

There has never been a case, prior to Harduvel, where an appellate court held that the government contractor defense had *any* application to manufacturing defects. In

fact, *all* appellate courts that addressed the issue, except *Harduvel,* have held that the government contractor defense has *no* application to findings of manufacturing defect. *See, e.g., Bynum v. F.M.C. Corp.,* 770 F.2d 556, 573 n.21 (5th Cir. 1985); *McKay v. Rockwell Int'l Corp.,* 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied,* 464 U.S. 1043 (1984).

The Eleventh Circuit's *Harduvel* opinion not only *applies* the government contractor defense to jury findings of manufacturing defect, but the opinion also fashions a new federal common law of product liability to *displace* state tort law standards of proof of manufacturing defect. *Harduvel,* 878 F.2d 1311, 1317 (11th Cir. 1989, cert. pending). Thus, the Eleventh Circuit's extension of the government contractor defense is in direct conflict with *every* other appellate court opinion that addressed the issue.

General Dynamics does not—because it cannot—present a single appellate court decision that is consistent with the Eleventh Circuit opinion. Rather, General Dynamics argues that the opinion is consistent with *Boyle* and that conflict prior to *Boyle* should be disregarded. *See* Gen. Dyn. Brief at 12-13. This argument is incorrect for two reasons.

First, *Boyle* never addressed the applicability of the government contractor defense to negligent or defective manufacture. As General Dynamics concedes at several points in its brief, the *Boyle* defense applies *only* to liability for design defects. *See* Gen. Dyn. Brief at 6, 9, 11, 13 n.5. Indeed, as Mr. Justice Scalia described the question presented in *Boyle*: "[t]his case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state

tort law for injury caused by a *design* defect." *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2513 (1988) (emphasis added).

Second, the conflict between the Eleventh Circuit and other courts of appeals prior to *Boyle* should not be disregarded. Boyle adopted a defense that was developed in the courts of appeals. *Boyle*, 108 S. Ct. at 2518. The Fifth Circuit recognized that *Boyle* "does not change the law in this and other Circuits, except to reject the ideological basis for contractor immunity based upon the *Feres* doctrine." *McGonigal v. Gearhart Industries, Inc.*, 851 F.2d 774, 777 (5th Cir. 1988).

Moreover, in *Boyle*, this Court agreed "with the scope of displacement adopted by the Fourth Circuit here, which is also that adopted by the Ninth Circuit, *see McKay v. Rockwell Int'l Corp.* . . . . [704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984)]." *Boyle*, 108 S. Ct. at 2518. Of course, the "scope of displacement" adopted by the Ninth Circuit prohibits application of the government contractor defense to *manufacturing* defects. The Ninth Circuit held in *McKay*:

> We also note that the rule enunciated here does not relieve suppliers of military equipment of liability for defects in the manufacture of that equipment. To hold otherwise would remove the incentive from manufacturers to use all cost-justified means to conform to government specifications in the manufacture of military equipment.

McKay, 704 F.2d at 451.

McGonigal advances the policies of *McKay*. *See McGonigal*, 851 F.2d at 777. *Harduvel* does not advance the policies of *McKay* or *Boyle*. *See* Comment, *Government Contract Defense: Sharing the Protective Cloak of*

Sovereign Immunity After McKay v. Rockwell International Corp., 37 Baylor L. Rev. 181, 194 (Winter, 1985) ("It is clear that policy considerations which support the government contract defense in the design context break down when the injury causing defect is a result of the manufacturing process").

Janet Harduvel asks this Court to resolve the real and intolerable conflict on whether the government contractor defense has any application to jury findings of negligent and defective manufacture.

3. General Dynamics' Characterization of Florida Tort Law Inference.

In an effort to defuse the impact of the Eleventh Circuit's displacement of Florida tort law, General Dynamics maintains that "Petitioner has distorted the manner in which Florida law operates." Gen. Dyn. Brief at 13. General Dynamics then embarks on a lengthy interpretation of Florida law. *Id.* at 13-14.

Janet Harduvel submits that General Dynamics' interpretation of Florida law is irrelevant; rather, what is relevant is how the Eleventh Circuit interpreted Florida law. In the opinion below, the Eleventh Circuit held: "[u]nder Florida law, where a product is destroyed in an accident, and the plaintiff presents evidence to negate possible causes other than a product defect, an inference of *manufacturing* defect arises." *Harduvel,* 878 F.2d at 1317 (emphasis in original). Janet Harduvel's interpretation of Florida law is *exactly* the same as the Eleventh Circuit's interpretation. *See* Harduvel Pet. at 7 n.1. With this interpretation, the Eleventh Circuit applied "federal common law" to displace the Florida law inference. *Harduvel,* 878 F.2d at 1317.

4. Alleged Evidence of Conformance with Specifications.

With regard to the misplacement of the burden of proof, General Dynamics first denies that the Eleventh Circuit held that Mrs. Harduvel had failed to prove that the equipment did *not* conform to specifications. Gen. Dyn. Brief at 15. General Dynamics then theorizes that the Eleventh Circuit really held that Mrs. Harduvel failed to refute General Dynamics' affirmative evidence that "the aircraft did, indeed, comply with specifications." Gen. Dyn. Brief at 15. There is simply no language in either the record or in the Eleventh Circuit opinion by which one can divine that General Dynamics *proved* that the equipment conformed to specifications.

The "design feature in question" was a design defect known as "wire chafing." *See Boyle,* 108 S. Ct. at 2518. The Eleventh Circuit held that Mrs. Harduvel presented "substantial evidence" of this design defect. *Harduvel,* 878 F.2d at 1321.

Nothing in the government contract or in the Air Force approved specifications required "wire chafing." In fact, the military specifications expressly prohibited wire chafing. *See* Harduvel Pet. at 17-18. General Dynamics' witnesses testified that conformance with specifications would have prevented wire chafing (R. 15-85-87).

This is not a case, like *Boyle,* where the contract and specifications required a particular design feature (a helicopter escape-hatch that opened outward) and the state law duty of care required something "precisely contrary" (a helicopter escape-hatch that opened inward). *Boyle,* 108 S. Ct. at 2516. Rather here, the contract and the specifications and state law *all* required that the aircraft

be designed without "wire chafing"—or, at least, no *contrary* duty was imposed by the contract or specifications. In a like situation, *Boyle* held:

> The contractor could comply with both its contractual obligations and the state-prescribed duty of care. *No one suggests that state law would generally be preempted in this context.*

Boyle, 108 S. Ct. at 2516 (emphasis added).

In contrast to General Dynamics' assertions, no government official balanced the "safety concerns" of this design defect "against cost and performance." Gen. Dyn. Brief at 9-10 (citing *Harduvel*, 878 F.2d at 1322). Hence, there was no proof of governmental discretion—the rationale for this second element. *Boyle*, 108 S. Ct. at 2518; *see also Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1486 (5th Cir.), *cert. denied*, 110 S. Ct. 327 (1989); *Berkowitz v. United States*, 108 S. Ct. 1954, 1958 (1988).

Under a proper *Boyle* analysis, absent proof of contrary contractual duties or governmental discretion, state tort law liability should not have been preempted. The Eleventh Circuit erred when it upheld the defense, without affirmative proof of conformance by General Dynamics.

5. Alleged Authority for Rendition, Rather Than Remand.

With regard to the lack of development of the *Boyle* defense in the district court, General Dynamics asserts that there is no conflict with *Garner* because General Dynamics asserted a defense similar to *Boyle* in a motion for summary judgment. Gen. Dyn. Brief at 17. However, in *Garner*, the district court also precluded the develop-

ment of the *Boyle* defense by pretrial ruling. *See Garner v. Santoro,* 865 F.2d 629, 633 (5th Cir. 1989). The Fifth Circuit remanded the case for a full development of the *Boyle* defense before a jury. *Id.* at 635. Janet Harduvel asks for that opportunity here.[1]

6. Alleged "Disingenuous" Newly Discovered Evidence.

In an unusual ad hominem argument, without reference to the record or any case law, General Dynamics would characterize Janet Harduvel's request for remand based on newly discovered evidence as "baseless," "shabby," "coy," "disingenuous," "desperate," and "spurious." Gen. Dyn. Brief at 21-22 n.8. Not surprisingly, General Dynamics has *not* taken the position that it, in fact, produced the evidence in response to court order or discovery, nor has General Dynamics denied that the evidence is genuine.

The evidence withheld by General Dynamics included some revealing information. For example, an F-16A document noted that upon routine inspection, oversized screws on the cable clamps "did not meet the specifications mentioned in specification control drawing 08821." *See* Appendix to Petition for Rehearing at 2 (in record at Court of Appeals). Such screws cause "severe wire harness chafing." *Id.* Another document reported an inspection of an aircraft from the same production block as Captain Harduvel's aircraft (4 serial numbers away) with massive electrical malfunction due to wire harness chafing. *Id.* at 4. Further inspection revealed 12 other

1. General Dynamics also attempts to compare the "procedural course" in *Boyle* to this case. But, the *Boyle* petitioner never asked, as Janet Harduvel does here, for a sufficiency of the evidence review. *Boyle,* 108 S. Ct. at 2519.

aircraft (out of 83) with the "same chaffing [sic] problem." *Id.* In one document, General Dynamics even comments that "if the wire harnesses were installed correctly per installation drawing 16D51825, this chafing incident would not have occurred." *Id.* at 13. Other evidence included numerous reports of wire chafing and electrical fires caused by "protrusion of the fasteners," "incorrect clamp installation," poor "quality control," oversized clamps, and so forth. *Id.* at 1-20. General Dynamics offers *no* explanation why it withheld this information from document production prior to trial.

General Dynamics suggests, again without any authority, that Janet Harduvel (who prevailed at trial), was somehow dilatory in bringing this newly discovered evidence to the attention of the Eleventh Circuit. Of course, this Court has held that the party who prevailed in the lower court, but suffered a judgment reversal, is entitled to raise new trial issues for the first time in a petition for rehearing. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 329 (1967).

Finally, General Dynamics contends that Janet Harduvel's state court fraud action against General Dynamics is an attempt to "manufacture credibility" before the Court. Janet Harduvel points out that it was General Dynamics, and *not* the Petitioner, who first brought the state court fraud action to the attention of this Court. Janet Harduvel asks this Court only to consider the record as it stood before the Eleventh Circuit in this case.

Because the newly discovered evidence presented an issue best resolved by the trial court, the Eleventh Circuit erred in its failure to remand. *Neely*, 386 U.S. at 325; *Gough v. Rossmoor Corp.*, 533 F.2d 453, 454 (9th Cir. 1976).

CONCLUSION

Despite General Dynamics' attempts to mischaracterize the arguments, this petition presents issues of national importance on which the court of appeals are in conflict. A definitive resolution of such conflict will assist litigants and courts in the proper application of the defense.

For these reasons, Janet Harduvel prays that her petition for writ of certiorai be granted.

Respectfully submitted,

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